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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 60.

JULIUS A. KRUG, Department of Interior, *Petitioner*,

v.

SHERIDAN-WYOMING COAL COMPANY, INC.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INTRODUCTION.

Respondent respectfully directs this Court's attention to the fact that this cause has been argued twice, at extraordinary length, before the bar of the Court of Appeals; that has, moreover, been argued in numerous and extensive hearings in chambers. The first opinion appears at pages to 4 and the second at pages 78 to 86 of the Record. omparing the petition with the second opinion, it will be vident that few of the Court's points are challenged, *and ot a single one of its twenty-two supporting case authorities are either cited or discussed.* So altered and transformed is the factual picture and legal background, it

might well be concluded that the petition had been filed in a different case.

Does petitioner's brief constitute an accurate and full statement of the facts and issues here involved? If one looks no further than his presentation, it seems incredible that any court could make so erroneous a decision. Typical is petitioner's conclusion that "the decision below means that all persons who have received coal leases since 1934 have standing to attack in court the issuance of leases which might possibly result in competition with existing mines"[1]. (Pet. 16)

Moreover, the assertions of fact, contrary to plain allegations of the amended complaint, on which the petition rests, namely (1) an exception to the Regulation for bigness—large "existing", if new mines—and (2) that the Regulation, as previously construed, binds only his subordinates, —belong in an answer, not in a petition.

Respondent, therefore, requests the indulgence of this Court in making a response more lengthy and detailed than is normally necessary or advisable, in order that the Court may fully comprehend the actual issues, exhaustively considered and correctly decided below.

COUNTER STATEMENT.

Fifteen years ago, the government of the United States, pursuant to a general policy of preventing the creation of unneeded competition in the chronically sick coal industry, promulgated a valid statutory Regulation (43 C. F. R. 193.3) requiring a showing and a finding of consumer need before the issuance of additional Federal coal leases. Thus, in times of prosperity, uneconomic new coal enter-

[1] Of course, as the record demonstrates, only if the Secretary breaches his own statutory regulation flagrantly—by a novel and isolated attempt at issuance of a lease without the finding required by its own standard—consumer need—can, and should, anyone sue; and then only Federal lessees faced with direct irreparable damage thereby.

prises on the public lands would be avoided. Current overproduction indicates the timeless wisdom of this policy.

The petitioner has long and profitably leased Federal coal lands to respondent. (R. p. 49, 50). Respondent has expended great sums in reliance on the restrictive Regulation as an inducement. Yet petitioner now proposes to create new Federal competition for respondent by granting certain leases to a newly established and adjoining state mine, the Big Horn Coal Company. This he would do in the teeth of the Regulation requiring a showing and finding of consumer need, although he found none; this he would do while reaffirming the regulation and its wisdom; and despite the withdrawal of the lands for this public purpose.

While the export coal industry until recently enjoyed a post-war boom, the Monarch area coal industry has, due to its low grade, non-exportable, substandard, non-storable coal, almost immediately suffered a return to its long-term drastic consumption downtrend which had been relieved in forty years only by the two war booms. (See Graph, Exhibit F, Original and Amended Complaints, R. 37).

Respondent, Sheridan-Wyoming Coal Company, leases certain Federal coal lands in and around Monarch and Sheridan, Wyoming. It operates the Monarch mine upon such land which was leased in 1943. Previously it held Federal coal leases and operated coal mines in this same area long before 1934.

Respondent has expended over $1,350,000 in developing its 1943 lease, and has paid royalties on over 1,300,000 tons of coal to petitioner. (Amended Complaint, First (e), R. 50).

In late 1943, the Big Horn Coal Company, a subsidiary of the gigantic road building contractor Peter Kiewit & Sons[2] of Denver, Colorado, somehow prevailed upon the

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[2] Its size may best be judged from the fact that it has had backlogs of contracts running in the neighborhood of 70 to 80 million dollars. (Affidavit of D. H. Pape, R. 46)

The petition (Pet. 13) thus claims that the United States was a necessary party, as a consequence of the erroneous "specific performance" theory. But it has been well settled in a long line of cases from *United States* v. *Lee*[27] to *Land* v. *Dollar*[28], that a citizen having a property right or other legally protected interest may restrain a governmental officer threatening that right by proposed action of an unconstitutional nature or of a nature contrary to or beyond the purported statutory authority. Of course, the United States is not a necessary party to remedial litigation incident thereto. Here, respondent unquestionably has property rights, non-contractual in nature, in its own business and in its leasehold interest, apart from its contract rights; independently, respondent has a special property interest acquired by lawful membership in a regulated, restricted and limited class, *i.e.*, as one of the need-limited number of Federal coal lessees permitted by the Regulation. *Frost* v. *Corporation Commission, supra; Cf. Philadelphia Co.* v. *Stimson.*[29] The very statute upon which petitioner relies for power to issue the Big Horn lease places that issuance beyond his powers. Regulation 193.3 has been issued and promulgated as law under a specific power and duty in the Leasing Act; moreover, Congress has subsequently amended the Leasing Act, thereby reenacting the Regulation as a part thereof. An officer, like petitioner here, threatening action lawless because beyond and directly contrary to his statutory powers and duties, cannot cloak his dereliction by claiming the United States is a necessary party thereto. Petitioner's same error was unsuccessfully advanced by Albert B. Fall to prevent challenge of his acts beyond and contrary to the statute conferring his authority in the premises. *Santa Fe Pac. Ry.* v. *Fall*, 259 U. S. 197 (refusal to patent properly selected lieu lands).

[27] 106 U. S. 196.
[28] 330 U. S. 731.
[29] 223 U. S. 620.

State of Wyoming, with whom Kiewit had many road building contracts, to allow them to establish a new mine in this immediate area by leasing State lands. (R. 15). Some few months later, in early 1944, the Big Horn Coal Company started producing this substandard type of Sheridan area coal in direct competition with appellant. The disastrous effect of this competition, in a declining market for this coal, is apparent from the Graph, Exhibit F.[3] It has reduced Sheridan's production to less than half its 1,200,000 ton annual capacity.

When the Big Horn Coal Company established its new mine on State lands it had *already* applied for a Federal lease. Big Horn swore this Federal lease was economically necessary to justify the investment required for the establishment of its new state mine. (Original and Amended Complaint, Fifth (c), R. 11). The Big Horn Company was, of course, on notice of the long published and established rule of Regulation 193.3 in force since 1934, in reliance upon which respondent has been induced to do business with petitioner.

Their application, in the teeth of the valued Regulation, aroused an industry-wide storm of protest. Respondent protested before the Department even before[4] its publication by the petitioner; other protestants were the Southern Wyoming Coal Operators Association, the United Mine Workers, the Montana Coal Operators' Association, Coal Producers' Association of Washington, Utah Coal Operators' Association, Colorado and New Mexico Coal Operators' Association, etc. (R. 20).

The effect of Big Horn's slow departmental tactics[4] while hastily proceeding with opening and pushing their State

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[3] The figures represented graphically here were taken from official sources of the U. S. Department of the Interior. Graph F. appears at R. 37, and is incorporated in both the Original and Amended Complaints.

[4] Big Horn had delayed publications of this application from 1943 to 1945 by requesting a special 8¢ royalty rate (2¢ below the usual Federal rate).

mine, was to create the spurious appearance of "going concern values", hardship and equities when the Federal lease was finally considered. Thus the small state lease was to be used as a springboard to the vast Federal reserves. They would "lift themselves by their bootstraps". And they succeeded before the Department.

None of the three administrative decisions in the instant case make a finding of need for an additional mine,[5] nor do they make a finding of an old[6] mine which the Undersecretary thought[7] might alter the need requirement. (Complaint Par. 10, R. 12, 13).

The italicized portions[8] of the first administrative decision (dated April 10, 1947) are an excellent example of the arbitrary and capricious tenor of the departmental decisions herein (R. pp. 17-32).

Typical is the statement: "This office will not countenance any deliberate attempts to circumvent the . . . regulation", when it then proceeds to do that very thing. The argument runs that respondent had the burden of proving "bad faith" in this respect on the part of Big Horn. None of the prior decisions construing the Regulation suggest so illogical and unfair a rule.[9] Big Horn applied for a Federal lease before starting their state mine. They obviously wanted the prohibitory regulation either ignored or overruled. They knew they could not meet the regulation's sole criterion—consumer need—in view of respondent's uniformly below-capacity operations. First they swore their state reserves were inadequate to justify their

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[5] Complaint, Tenth (e), R. 13.

[6] The first decision made gestures in that direction of a vague and implicatory character; later decisions definitely found "new mine".

[7] Actually, all applications are screened against the need criterion (Amended Complaint, Paragraph First (e) and (g), R. 49).

[8] See pages 18 and 19, Record.

[9] See the *Olson* and *Cox* decisions, Amended Complaint, R. 51-61, incl., which are representative of the established construction (Amended Complaint, Paragraph First (e), R. 49).

planned investment before making it; then they rushed ahead with development which they rely upon as creating "going concern" equities. Thus, they adopted a course of action effective only to circumvent the Regulation, whatever their mental state.

The next paragraph of the department's opinion urges that "Reg. 193.3 does not apply to cases where *Federal* lessees seek additional land", citing 43 C. F. R. 193.15. First, that regulation rests upon express authorization by Congress in 30 U. S. C. 203 for granting additional land to *Federal* lessees upon exhaustion of reserves. Second, Regulation 193.15 itself states that its modifications of Federal leases are "to be made under similar procedure and *on the same conditions* as original leases." (italics supplied). Thus the statement quoted is disproved by its own citation. In any event, any rights conferred by § 203 cannot go beyond Congressional intent, which was limited to Federal lessees.[10]

At this point, petitioner's effort begins to disregard the universal criterion of Regulation 193.3—need—by suggesting a novel exception for "going mine", or "existing mine". In practice, in every case since 1934 the challenge has been to prove consumer need for the lease.[11] Only this can serve the basic purpose of the Regulation—preventing recurrence of anarchic over-production.[12] In this case, for the first time, the suggestion is made that the larger and more devastating the new competition on a non-Federal foothold—"existing large mine"—the better the reason for abandoning protection of established Federal lessees. In other words, the larger the violation of Regulation 193.3, the better the justification.

This decision then admits two excellent reasons for deny-

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[10] Naturally, Federal lessees have something analogous to "grandfather" rights; they have made an investment *after* meeting the criterion. 30 U. S. C. § 203 is reprinted at R. 67.

[11] Amended Complaint, Paragraph First (e) R. 49.

[12] See *Cox* and *Olson* cases, *supra*.

ing Big Horn a lease because they show there is no need—(a) there is lots of other competition; (b) the coal is poor."[13]

Next, a full admission is made that issuance of the proposed leases does not meet the criterion of Regulation 193.3 in the following language:

> "The usual criteria to determine the need for a new mine under Regulation 193.3 do not apply." (R. 19).

because Big Horn was a "going concern". (No such exception can be found in the Regulation, its history, policy or application.) Another pretext for refusal to apply 193.3 follows:

> (the) "evidence fails to disclose that its operation (Big Horn's) has jeopardized the continuance of the competing Sheridan-Wyoming mine"[14]

Again, this quotation admits no need, by pointed failure to make the finding of consumer need for a Federal lease for the Big Horn Coal Company, while discussing the economics of the Monarch coal area.

The second decision (dated July 29, 1947) (R. 21) while affirming the first decision clarified the supposed "old mine" issue in the following language (top of page 24, Record):

> *"In essence, a new mine was created"*. (Italics supplied.)

This decision concluded:

> "to grant a lease to Big Horn leaves open the *possibility* of continued existence of both the applicant and its present competitors". (Italics supplied; R. 27).

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[13] "(2) and (3)" R. 18.

[14] The uncontroverted evidence does show Big Horn has reached a production equal to Sheridan-Wyoming's 1943 sales and taken a lion's share of the present market for this substandard coal, leaving Sheridan operating at less than half proven capacity. (Graph, Exhibit F, R. 37.)

Thus, although there was an admission Big Horn was a new mine, the requisite finding of need was again skirted and omitted, and a finding of *possibility* of continued existence was substituted. This palpable error of law appears as a part of a continued search for plausible pretexts to reach a predetermined result.

The third decision (dated October 22, 1947) expressly refuses even to estimate future consumer need (the heart of the "showing of need" criterion):

> "The prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence." (R. 28, 29).

Next comes the remarkable fallacy that a company buying new mining equipment of the latest type makes no *investment* unless it *borrows* money. If it uses its own cash, or its profits, says the petitioner, no investment is made. Thus, petitioner says Sheridan made no investment since it last borrowed money (Prior to 1934) (R. 30, 31).

Accent on bigness of Big Horn is the closing keynote of this decision. Without finding consumer need, the very thing which makes Big Horn's violation of the Regulation the more menacing is used as the pretext for exemption.

Finally, the decision refuses to set the limits of the supposed "exception" to the Regulation.

> "What the decision would be *were* a case presented where a new mine opened on non-Federal lands with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding." (R. 31, 32).

But this is exactly the case presented. The Big Horn Coal people filed a Federal lease application even before incor-

poration. This they did because of inadequate state reserves (which had to be and was asserted under oath in the application). Then, the very question to be determined is whether or not existence "for any period of years" (what period?) or "establishing a position of importance" (i.e., mere bigness) can be substituted for the finding of need required by the law of Regulation 193.3.

This transparent attempt to side-step the plain language of the Regulation and its long-standing interpretation is revealing. Even the new "exception" illegally attempted is couched in negative terms of the utmost vagueness, thus making Big Horn its sole beneficiary.

So, upon these shifting sands of fallacies, pretexts and nonsequiturs, Big Horn is alone granted exemption from the law of the land—essentially because it is big. This the Court of Appeals has properly struck down, as the record will demonstrate.

REASONS FOR DENYING CERTIORARI.

1. Petitioner charges error "as to respondent's standing to sue" in that:

> "the Court below *concluded that the regulation was in effect incorporated into the lease.* On that premise, it held that the lease contained *an agreement* that the United States would limit future coal-mining leases of the public lands to cases in which there was a satisfactory showing that an additional coal mine was *needed* and *hence that respondent had standing to maintain this suit.*" (Pet. 9).

He then chiefly and almost exclusively endeavors to show that the terms of the Regulation did not forbid the Secretary himself to issue the lease.

Respondent is compelled to divorce these numerous issues; and will show: (a) That, by its terms, by its hitherto uniform application and in the light of its purpose, the Regulation forbids the issuance of the leases; (b) that the Regulation has the force of statute, and is not a "mere

declaration of policy"; and (c) that violation of the Regulation is illegal, and respondent has standing to challenge this illegality, because the Regulation was incorporated into respondent's lease, and was relied upon by respondent, and because respondent is a member of the circumscribed and limited class created by the Regulation.

Regulation 193.3 prohibits issuance of the lease in question by its terms, purpose, and uniform interpretation. Both the original and amended complaints allege that the appellee has not made, and cannot make, the requisite finding of fact—i.e., that there is consumer need for Big Horn's production. These allegations stand undenied. (See, for fuller treatment, Counterstatement, *supra*, pp. 5-9).

The terms of Regulation 193.3 clearly and unmistakably prohibit issuing a lease to Big Horn without this requisite finding:

> "SHOWING REQUIRED THAT AN ADDITIONAL COAL MINE IS NEEDED. The General Land Office *will* make favorable recommendation that leasing units be segregated and that auctions be authorized *only* in cases where there has been furnished *a satisfactory showing that an additional coal mine is needed* and that there is an *actual need for coal which cannot otherwise be reasonably met.*" (Italics supplied.) (43 C. F. R. 193.3).

The purpose of Regulation 193.3, promulgated in February 1934 was preventing the creation of unneeded Federal coal mines. Anarchic conditions in the coal industry are recurrent results of chronic peacetime overcapacity, and were then most severe. The creation of new unneeded Federal mines would obviously have a disastrous effect upon the investment, conservation practices, and revenues of existing Federal coal lessees. The terms of the withdrawal letters (Exhibits A and B, R. 16 and 17) which immediately preceded the promulgation of the Regulation further clarify this point and elucidate the high policy of law behind the regulation. A chief purpose of both actions was self-

evidently to prevent by law the creation of *unneeded* competition for existing Federal coal lessees.

In the three recent cases within the Department (which restate the position of the Department in some forty other cases), the Regulation has been repeatedly construed in accordance with the decision of the Court of Appeals. In *Carl T. Olson*, Bismarck N 024806, Decided March 25, 1946, and the same case on rehearing, December 19, 1946, together with *Lyman Ray Cox*, Salt Lake City, 065269 N, the Regulation was properly treated as follows:

(1) The petitioner invoked the "*rule*" of 193.3 as a *rule* having the force and effect of law which *precluded* granting a lease to an unneeded mine.

(2) The petitioner treated the policy which it established as one of broad public significance affecting third parties *and especially protecting the existing coal lessees.*

(3) Petitioner specially indicated that the Regulation would have to be repealed before its policy was abandoned;

(4) The Regulation was *invoked specially as a part of the Federal Code of Regulations*, as required by 5 U. S. C. A. Sec. 1002 and 44 U. S. C. A. Sec. 511.

Specific reference to the above conclusions from the *Olson* and *Cox* cases are as follows:

(1) The *Carl T. Olson* case, No. A 24226, dated December 19, 1946, states:

> "The ground for the *decision* was a *finding* that there is already sufficient productive capacity in the vicinity to meet the demands of the market. . . . In such cases the *rule* of the Department *precludes* the granting of an additional coal lease (43 Code Federal Regulations 193.3). Further, upon examination of the reasons which gave rise to the establishment of the rule the decision concluded that it would be contrary to the

public interest to *abandon this rule.*" (Italics but not parentheses supplied, R. 57).

(2) A previous decision in the same case (A 24226) dated March 25, 1946, contains the following significant language:

"This consideration taken into conjunction with the position of the Department as a present and potential royalty owner, indicates that *revision* of the Departmental *rule* at this time *would be harmful to the lignite coal industry and not in the public interest.*" (Italics supplied, R. 56)

(3) The *Lyman Ray Cox* case, *supra*, after quoting 43 Code Federal Regulation 193.3 stated:

"This *regulation* was *promulgated* in 1934. The propriety of continuing the regulation was recently examined in detail and it was concluded that the *repeal* of the regulation would be harmful *both to the bituminous coal industry* and to the public interest." (Italics supplied, R. 60).

Thus, these decisions clearly indicate petitioner is powerless to issue the leases in the absence of need; they unmistakably mean he is precluded from and powerless to do so *in view* of the Regulation and, at the very least, that he is powerless to issue the leases *without repeal*[15] of the Regulation.

Naturally, this accords with the rule that *the Regulation has the force of statute.* The Secretary of the Interior has authority under the leasing act to issue Regulations necessary and proper for carrying out his functions. 30 U. S. C. § 189.

Pursuant to this authority he issued Regulation 193.3 and caused it to be published both in the Federal Register and in the Federal Code of Regulations.

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[15] It should be carefully noted that, in the various departmental decisions in the case at bar (R. 17 through 32) the regulation has *not* been *abandoned* but has again been *reaffirmed*, no doubt for the reasons so eloquently stated in the *Olson* cases.

It was his duty to publish in the Federal Code of Regulations those of his regulations which had the force and effect of statute. His responsible agent has stated in the preface to the land regulations that they are published in pursuance of the requirements of the statute:

"FOREWORD

"This pamphlet contains the *codification* of the rules and regulations assigned to Par. 193, Title 43, of the Code of Federal Regulations. No amendments thereto have been made. The regulations were codified and published *pursuant to* Section 11 of the Federal Register Act, as amended (50 Stat. 304; 44 U.S.C. Sup. 311). Part 193 contains the regulations relating to coal permits, leases, and licenses, exclusive of Alaska." * * *

"The Federal Register Act makes the documents which were codified and published pursuant thereto prima facie evidence of the text of such documents and of the fact that they are *in full force and effect* on and after the date of publication."

* * * * *

"FRED W. JOHNSON,
Commissioner."

(Italics supplied)

The pertinent provisions of 44 U. S. C. Supp. § 311, referred to in the Foreword, follows:

"Report by Government agencies of documents issued: publication in supplement to Register.

(a) On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete *codification* of all documents *which, in the opinion of the agency, have general applicability and legal effect* and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938 or on the same date of every fifth year thereafter. The Com-

mittee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register."

• • •

"(c) The codified documents of the several agencies published in the supplemental edition of the Federal Register pursuant to the provisions of subsection (a) hereof, as amended by documents subsequently filed with the Division, and published in the daily issues of the Federal Register, *shall be prima-facie evidence of the text of such documents and of the fact that they are in full force and effect on and after the date of publication thereof.*" . . . (44 U. S. C. Sup. 311) also 5 U. S. C. 1002 and 44 U. S. C. Sup. 305) (Italics supplied).

Thus, petitioner has led every one to believe that Regulation 193.3 has the force and effect of statute by publishing it in the Federal Code with a preface referring to these statutes. The petitioner in the District Court for the first time asserted that the Regulation is a mere internal declaration of policy without the force and effect of law.

Obviously, the contention cannot be sustained that the Regulation, thus duly promulgated, was a mere internal directive for the guidance of Bureau of Land Management and did not bind the Secretary of the Interior. The rule is well settled that the land Regulations of the Secretary of Interior have the force and effect of statute. *Hodgson* v. *Midwest Oil Company*, 297 F. 203. See also *Germania Iron Company* v. *James*, 89 Fed. 811. Petitioner has at no time openly contested this rule.

In the *Hodgson* case, the issuance of a lease to the Midwest Oil Company would have been illegal, and the leasing act unconstitutional, but for a regulation of the Secretary of the Interior. This Regulation provided the constitutionally necessary notice to other possible claimants which had been omitted from the Statute.

If these Regulations can shore up the Leasing Act against otherwise sound constitutional attack, surely they must have the effect of statute. They cannot be mere pious

platitudes of internal policy or mere directives to personnel, subject to the personal whim and caprice of the occupant of the Secretary's chair.

Germania Iron Co. v. *James, supra*, is a complete answer to the contrary contention, as the Court of Appeals emphasized. In *Germania*, an established practice of the General Land Office, even though not formalized into statutory regulation, bound the Secretary as well as his subordinates. Moreover, petitioner's own decision here (being mere affirmance of a decision of the Bureau of Land Management) furnishes no hint that the Secretary had any idea of exercising independent authority to override the regulation, not possessed by that agency of his.

It should be noted that petitioner has neither mentioned the *Germania* case, which was given maximum emphasis as on all fours by the Court of Appeals; nor the more recent cases[16] expounding the same necessary rule, namely, that when an officer has issued a statutory regulation under a Congressional delegation of legislative power, he has fully exercised his "discretion"; thereafter he has no power to ignore and rise above the law of the land, merely because it happens that he was the conduit of its making.

Petitioner has abandoned his citation below of leading Interior Department language construction cases. Very likely this is because they are in point, but against him. Compare *Work* v. *Rives*, 267 U. S. 175, cited by petitioner below, with *Work* v. *Mosier*, 261 U. S. 352, and *Work* v. *McAlester*, 262 U. S. 200. The petition instead seeks to negate the conclusion of the Court of Appeals that the Regulation was incorporated into Sheridan's lease by operation of law (*Wood* v. *Lovett*, 313 U. S. 362), by reliance upon the inapplicable rule of *Charles River Bridge* v. *Warren Bridge*[17]

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[16] *Consumers Power Company et al.*, 6 S. E. C. 444 (1939); *United States* v. *Perkins*, 79 F. (2d) 533 (C. C. A. 2d, 1935); *Sibray* v. *United States*, 282 Fed. 795 (C. C. A. 3d, 1922); *United States* v. *Dunton*, 288 Fed. 959 (S. D. N. Y. 1923).

[17] 11 Pet. 420.

and related cases.[18] Respondent freely concedes the rule of these cases that *doubtful* language in grants of *special privileges* is to be construed most strongly against the *donee* and in favor of the public. The difficulty is that the rule has no application to the factual situation in this case. First, no doubtful language is present in Reg. 193.3 (see *supra*), and moreover the language of the Regulation has an established and unmistakable administrative construction. Next, this is not, as were the cases cited by petitioner, a grant of special privilege, i.e., a *particular grant* of a monopoly of an essential and normally governmental service, such as a bridge, a city water works, or a toll road. The present case is, on the contrary, one of attempted illegal breach of a *general regulation* restricting an entire industry—Federal coal lessees—in the interest of the public ("consumer need"), as well as in the interest of the industry protected. Closely resembling it are *Frost* v. *Corporation Commission*, 278 U. S. 515; *Chicago Junction* case (*Baltimore & Ohio RR.* v. *United States*), 264 U. S. 258; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. (2d) 308, 322 (App. D. C. 1938). In this type of situation, the rule of strict construction, designed as it is to protect the public, applies against the wrong-doing governmental officer. Finally, this case is even stronger on its facts than *Frost* and *Chicago Junction* because it is squarely upon all fours with *Wood* v. *Lovett*, *supra*. In *Wood* v. *Lovett*, a citizen had bought government property at auction and received a deed, quit claim in form; but there was a statute guaranteeing such purchasers against certain defects in title. This Court held that the statute was included in the deed by operation of law. So here the Regulation guaranteeing that respondent's lease was one of a restricted number of leases is included by operation of law because respondent has paid full price for the lease and has relied upon the regulation in doing so (Amended Complaint First (e), R. 49). Moreover the lease itself (Exhibit J., R. 60, 61) states that it is

[18] Pet. 10.

issued "under, pursuant, and subject to" the Mineral Leasing Act; that Act having been amended since the promulgation of the Regulation, the Regulation has been reenacted as a part thereof. *R. J. Reynolds Tobacco Company* v. *Helvering*, 306 U. S. 110 (1939).

2. Petitioner urges that "as construed by the Court below, the Regulation is invalid because it exceeds the statutory authority granted by the Mineral Leasing Act". He seems to overlook that he charges himself with a long and studied course of illegal action, since the Court below has merely adopted the construction he has employed for the thirteen years preceding the present case. (*Supra*, pp. 11-14)

After this confession of fault, he asserts, to prove it, a sweeping "discretion" which he cannot "abdicate", extending to the breach of the statutory Regulation. For this, he cites 30 U. S. C. § 201. But this section authorizes the Secretary of the Interior to divide coal lands for leasing; and "in his discretion, upon the request of any qualified applicant or on his own motion, offer . . . for leasing . . . and shall award leases thereon by competitive bidding or by such other methods as he may *by general regulations* adopt . . ." (italics supplied). Thus, the Section quoted itself provides for the governance of leasing by *general* regulation adopted by the Secretary. This certainly cannot mean that he is to make *general* regulations only that he may breach them at will.[19] When this citation is coupled with 30 U. S. C. §189, specifically authorizing the Secretary "to prescribe necessary rules and regulations . . . to carry out and accomplish the purposes of this act", and buttressed by the cases which the Secretary[20] and his predecessor[21] have repeatedly cited for the authority to make the restrictive conservation rule represented by Reg. 193.3 (*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344; *United*

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[19] *Germania Iron Co.* v. *James*, *supra*.

[20] *Olson* case, at R. 52, 53.

[21] Withdrawal letters, Exhibits A & B, Original and Amended Complaints, R. 16 and 17.

States ex rel. McLennan v. *Wilbur*, 283 U. S. 414) his authority to do so is perfectly undeniable.

The cases now cited by petitioner to avoid the correct result, abstracted as they are from the remote backdrop of Indian affairs[22], are totally irrelevant. There the Indians were claiming that a property right had been created for them by a temporary withdrawal; and could not be divested by the Secretary's customary, proper and formal restoration of the land to the public domain. Here the respondent has not asserted that any property interest was created by the withdrawal, and the petitioner has not attempted a restoration. Here respondent asserts only the illegality of leasing withdrawn and non-restored lands. Independent of the withdrawal, respondent's property rights, first deriving from its own lease, and its terms, and second from the special interest arising from respondent's property status as a regulated member of a special class—Federal coal lessees—provide standing to sue.

Thus, petitioner here has made a lease upon commercial terms to respondent. As so well demonstrated by the Court of Appeals[23], the statutory Regulation in question limiting additional competing leases to those needed by the consuming public, not only affects the value of the lease, but is a most valuable incorporated part thereof. Petitioner makes no attempt to reply to *Frost* v. *Corporation Commission, supra*, emphasized by the Court below, a case where this Court has extended its protection to a very similar though inferior property right, a regulatory franchise against unneeded competition which was not even part of a lease; nor to the *Chicago Junction* case[24], nor to the radio cases[25],

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[22] *Wilbur* v. *United States*, 281 U. S. 206; *Sioux Tribe* v. *United States*, 316 U. S. 317; *Ute Indians* v. *United States*, 330 U. S. 169.

[23] R. 85.

[24] *Chicago Junction* Case *(Baltimore & Ohio R. R.* v. *United States)*, 264 U. S. 258.

[25] *Fed. Comm. Comm'n* v. *Nat'l Broadcasting Co.*, 319 U. S. 239; *Scripps Howard Radio* v. *United States*, 316 U. S. 4; *Fed. Comm. Comm'n* v. *Sanders Radio Station*, 309 U. S. 47.

which are likewise in point here, and relied upon by the Court of Appeals.

Petitioner concludes this point with an inferential charge, thoroughly discredited in one of his own opinions[26], that respondent enjoys a monopoly—presumably of the coal industry. (Pet. 12)

He would thus ignore that the Mineral Leasing Act's prime purpose is conservation; that the acreage limitation of the Act is a self-executing guaranty against monopoly; and that the "consumer need" criterion for additional leasing is a further guaranty.

3. The petition next asserts that the lower Court has restrained the threatened breach of respondent's lease contract and this is, therefore, the equivalent of a suit for specific performance of a contract of the United States. (Pet. p. 12). Not so; what is really restrained is an assault on independent property rights created by the lease; moreover, respondent's prayer for relief is purely negative and prohibitory, in substance as well as in form. (R. 15). It requires no real, positive action, either from the petitioner or from the United States. Cases which petitioner cites (Pet. 12) are not in point here; they relate solely to injunctions, negative in terms, but in reality requiring positive action—i.e., specific performance. That question is not involved. But it is interesting to note that the plaintiff in *Goldberg* requested forced acceptance of an *offer*, not specific performance of a contract which created independent property rights; that any damage—arising from refusal to accept performance of contract services—in *Wells*, was completely compensable in the Court of Claims; that *Mine Safety*, in form a challenge to the government's authority to set off renegotiation deductions from amounts otherwise due the citizen, in reality sought to compel the government to pay out money.

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[26] R. 19. "Both companies apparently served customers over a very large area embracing several states in which there are numerous other active mines."

4. The petition (Pet. 13-15) charges error to the Court of Appeals in continuing the District Court's temporary injunction upon remand "until final disposition of the action". This phrase, lifted out of context, petitioner would torture into a broad and sweeping injunction for the entire duration of the litigation. Thus he finds violation of statutory requirements of findings of fact, foreclosure of all possible relief arising from changing conditions, and denial to petitioner of any opportunity to be heard on the validity of defenses, balancing of conveniences, etc.

An examination of the terms of the District Court's injunction (Addendum to Record, p. 91*ff*) and restoration of the quotation to context (R. 86) reveal petitioner's claims to be particularly erroneous and unfair.

The only action appealed was the District Court's order denying respondent's motion for leave to amend its complaint. The only questions then before the District Court were that motion, and a companion motion for preliminary injunction. The District Court, on June 4, 1948, entered a temporary restraining order or injunction to protect its jurisdiction until it disposed of them. By its order of July 6, 1948 (R. 63) it overruled both motions, but continued the temporary injunction for ten days in order to protect an orderly review of its action. Only the order denying the motion to amend the complaint was appealed, so that this was the only action of the District Court thereafter protected by the temporary injunction.

The scope of the District Court's injunction of June 4, 1948 by its own terms was naturally limited to protecting its action on the motions before it, just as its continuation thereof on July 6th was limited to protecting review of its action.

The temporary injunction of June 4th provided:

> "This order restraining and enjoining the issuance of the aforementioned coal mining leases shall remain in effect until the further order of this Court upon the disposition of the aforementioned motion for leave to file amended complaint and if the motion for leave is

granted then until plaintiff's motion for preliminary injunction is disposed of by the Court, and in the event the motion for leave is granted *then the motion for preliminary injunction shall be further heard within ten days thereafter.*" (Italics supplied)

The scope of a continuation can be no greater than the scope of the injunction continued. Not only is it absurd to argue that the Court of Appeals would attempt to enlarge the scope of the District Court's injunction but the full context negatives any such attempt.

The Court of Appeals' opinion provided:

"The judgment of the District Court is, therefore, reversed and the case remanded with instructions to that court *to permit the filing of the proffered amended complaint* and to deny defendant's motion to dismiss *in so far as that motion rests upon the ground that plaintiff has no standing to sue.* The temporary injunction heretofore issued by the District Court on June 4, 1948 will be continued in effect until final disposition of the action by that court." (Italics supplied)

The Court of Appeals had jurisdiction to continue the District Court's injunction until the subject matter which that injunction protected (the District Court's action on amendment of the complaint) had been finally disposed of by the District Court in accordance with the remand. Thus "final disposition of the action" *under review* could only mean the allowance of the amendment of the complaint and denial of dismissal on the ground twice held unsound. Then, the Court of Appeals continuance of the injunction, by its own terms, would automatically expire, and the terms of the District Court's order would automatically give an additional ten days for further hearing on the question of a preliminary injunction.

Even if the petitioner really misunderstands the Court of Appeals' plain language, and believes he needs clarification or alteration of the terms of the remand, his simple remedy would be to so move in the Court of Appeals. He seems to

recognize this (Pet. 15) but urges that this would require a "modification before the expiration of the present term of that Court." Why has he for four months, within the very time which he claims is a bar, failed to ask the Court of Appeals for clarification of its own mandate; and, at the same time, petitioned this Court for reversal of the Court of Appeals by arging a supposed error he has not even in the slightest manner brought to that Court's attention?

5. In the light of this real factual picture and legal background, the inaccuracies and overstatements of Point 5 of the Petition (Pet. 16) become apparent.

Contrary to the eloquent but unsupported forebodings of petitioner, the situation here is, as a matter of fact, unlikely to recur. The Secretary has never previously tried to issue a lease without the finding of consumer need; and he assures everyone of his devotion to that sound principle of the Regulation even in his very decision of this matter. In other leasing, where he made this finding, it would be, as a practical matter, both futile and impractical to seek restraint.

The statutory finding of fact, if so made, would be presumed correct and entitled to great respect; and this fact—consumer "need which cannot otherwise reasonably be supplied"—would preclude the existing lessees from showing irreparable injury, since they could not supply the coal anyway.

Petitioner, when he asserts "delays incident to such litigation" as an obstacle to all leasing, appears either to betray intention to issue leases without requisite statutory findings at his whim, or to suggest the bare possibility of frivolous future litigation as a reason for overturning just and lawful protection of respondent from destruction by petitioner's unusual, discriminatory and unlawful action in the case at bar. On the contrary, enforceability of this sound conservation regulation will restore the attraction of his leases, by lessening the recurrent threat of anarchic over-production of coal in the West. This problem, we

might suggest, is the precise reason why the Regulation was adopted in the first place and why it has been continued and reaffirmed for fifteen years.

The hinted ill effects on other Departments seem to amount to no more than that they will have, as usual, to observe uniformly construed and unrepealed Regulations, published by them in the Federal Register as having the force of law; scarcely a novel or shocking idea—but, on the contrary, a principle of justice so settled and accepted as to make needless yet another reiteration by this Court.

The Court of Appeals has not interfered with the discretion of the District Court, by the form of its mandate, as petitioner now charges. (*Supra*, 22, 23). Direction to the District Court extends only to the substantive law as decided by the Court of Appeals, with continuance of restraint only until the District Court can consider the matter of preliminary injunction in the light of that law. Nor has petitioner, by an appropriate motion, rendered the Court of Appeals any opportunity to correct the supposed error in the form of its mandate. This seems a necessary prerequisite, in fairness, to review here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be denied.

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